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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BRIAN KERRY O'KEEFE,

Petitioner

v.

BRIAN E. WILLIAMS, et al.,

Respondents.

Case No.: 3:14-cv-00477-RCJ-CBC

Order

14 **I. INTRODUCTION**

15 This case is a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Brian
16 Kerry O'Keefe, a Nevada prisoner. This case is before the Court for adjudication of the merits of
17 O'Keefe's remaining claims. The Court will deny O'Keefe's habeas petition, will deny him a
18 certificate of appealability, and will direct the Clerk of the Court to enter judgment accordingly.

19 **II. BACKGROUND**

20 O'Keefe was tried in state district court three times on charges of murder with the use of
21 a deadly weapon. The first jury convicted him of second-degree murder with the use of a deadly
22 weapon, and the judgment of conviction was entered on May 8, 2009. ECF No. 59. On April 7,
23

1 2010, the Nevada Supreme Court reversed O’Keefe’s conviction and remanded the matter for a
2 new trial reasoning that:

3 the district court abused its discretion when it instructed the jury that second-degree
4 murder includes involuntary killings that occur in the commission of an unlawful
5 act because the State’s charging document did not allege that O’Keefe killed the
6 victim while he was committing an unlawful act and the evidence at trial did not
7 support this theory of second-degree murder.

8 ECF No. 59-20.

9 On August 19, 2010, a second-amended information was filed, charging O’Keefe with
10 murder in the second degree with the use of a deadly weapon. ECF No. 61. The jury deadlocked,
11 and the court declared a mistrial. ECF No. 61-18 at 8. Following a third trial, the jury convicted
12 O’Keefe on June 15, 2012. ECF No. 63-29. The state district court sentenced him to a term of
13 120 to 300 months, with a consecutive term of 8 to 20 years for the deadly weapon enhancement.
14 ECF No. 76-7. The judgment of conviction was entered on September 5, 2012. *Id.*

15 The Nevada Supreme Court affirmed O’Keefe’s conviction on April 10, 2013. ECF No.
16 76-23. The Nevada Supreme Court denied O’Keefe’s petition for rehearing, and remittitur issued
17 on July 23, 2013. ECF No. 64, 76-25.

18 O’Keefe filed a motion to modify and/or correct his illegal sentence on January 27, 2014.
19 ECF No. 64-15. The state district court denied the motion on March 25, 2014. ECF No. 65-3.
20 The Nevada Supreme Court affirmed the denial of the motion on July 23, 2014. ECF No. 65-19.
21 O’Keefe filed a state post-conviction habeas corpus petition and a counseled, supplemental
22 petition. ECF No. 66-8, 67-7. The state district court denied O’Keefe’s petition on October 2,
23 2015, without an evidentiary hearing. ECF No. 68-18. The Nevada Supreme Court affirmed the
24 denial of the petition as procedurally barred on June 22, 2016. ECF No. 70-7. Remittitur issued
25 on December 16, 2016. ECF No. 70-27.

1 O'Keefe dispatched his federal habeas petition for filing on or about September 15, 2014.
2 ECF No. 1-1. O'Keefe filed an amended petition on December 1, 2014, and a notice of
3 supplemental authorities on February 2, 2015. ECF No. 7, 10. This Court dismissed O'Keefe's
4 amended petition without prejudice for failure to exhaust state remedies. ECF No. 14. Judgment
5 was filed on February 11, 2015. ECF No. 15. O'Keefe filed a motion for a certificate of
6 appealability, a notice of appeal, and a motion for this Court to reconsider its order. ECF Nos.
7 17, 18, 19. This Court denied the motion to reconsider and the motion for a certificate of
8 appealability. ECF No. 23. O'Keefe filed an amended notice of appeal. ECF No. 24. Counsel
9 was appointed for O'Keefe. ECF No. 28. The Ninth Circuit vacated this Court's order and
10 remanded the case for further proceedings after determining that at least one of O'Keefe's claims
11 was exhausted. ECF No. 30.

12 O'Keefe moved to withdraw counsel. ECF No. 39. O'Keefe's appointed counsel filed a
13 response indicating that he did not oppose O'Keefe's request to represent himself. ECF No. 40.
14 This Court granted O'Keefe's motion to withdraw counsel. ECF No. 49.

15 O'Keefe filed a pro se second-amended petition. ECF No. 50. O'Keefe's second-
16 amended petition asserts that his federal constitutional rights were violated due to the following
17 alleged violations:

- 18 1. The state district court failed to stay his trial despite having notice
of a writ order.
- 19 2. The state district court conducted a trial without subject matter
jurisdiction.
- 20 3. His right to be free from double jeopardy was violated because the
state district court ruled contrary to *Schad v. Arizona* and because
21 "when the Nevada Supreme Court stated that the 'evidence
presented at trial did not support this theory of second degree
22 murder,' jeopardy terminated."
- 23 4. The state district court denied his proposed implied malice jury
instruction, and as such, the jury was not properly instructed on the
elements of second-degree murder.

1 5. His rights to “law of the case[and] access to the court actual
2 innocence” were violated.

3 The Respondents filed a motion to dismiss the second-amended petition. ECF No. 56.
4 O’Keefe filed a motion for summary judgment. ECF No. 94. O’Keefe also filed a petition for a
5 writ of mandamus in the Ninth Circuit asking that this Court be compelled to rule on his motion
6 for summary judgment, the Respondents’ motion to dismiss, and the habeas petition. ECF No.
7 95. This Court granted the Respondents’ motion to dismiss in part. ECF No. 106. Specifically,
8 this Court held that “[t]he portion of ground 1 that alleges an equal protection claim and the
9 portion of ground 3 that claims a violation of petitioner’s rights pursuant to *Shad v. Arizona* are
10 unexhausted. Grounds 2 and 5 are dismissed.” *Id.* at 8. This Court also denied O’Keefe’s motion
11 for summary judgment. *Id.* at 10. O’Keefe filed a declaration of election to abandon “only [the]
12 equal protection claim in Ground 1” and “only [the] *Shad* [portion] from (exh. 228, pp 7-11)
13 Ground 3.” ECF No. 107 at 2. The Ninth Circuit denied O’Keefe’s request for a writ of
14 mandamus. ECF No. 112.

15 The Respondents filed an answer to the second-amended habeas petition on June 1, 2018.
16 ECF No. 115. And O’Keefe filed a reply on June 28, 2018. ECF No. 116. O’Keefe filed an errata
17 to his reply, a notice of supplemental authorities, and a second notice of supplemental authorities
18 on July 6, 2018, July 16, 2018, and August 14, 2018, respectively. ECF No. 118, 119, 121.

19 **III. STANDARD OF REVIEW**

20 28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in habeas
21 corpus cases under the Antiterrorism and Effective Death Penalty Act (“AEDPA”):

22 An application for a writ of habeas corpus on behalf of a person in custody pursuant
23 to the judgment of a State court shall not be granted with respect to any claim that
 was adjudicated on the merits in State court proceedings unless the adjudication of
 the claim --

1 (1) resulted in a decision that was contrary to, or involved an unreasonable application
2 of, clearly established Federal law, as determined by the Supreme Court of the
United States; or

3 (2) resulted in a decision that was based on an unreasonable determination of the facts
4 in light of the evidence presented in the State court proceeding.

5 A state court decision is contrary to clearly established Supreme Court precedent, within the
6 meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts the governing
7 law set forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts that
8 are materially indistinguishable from a decision of [the Supreme] Court.” *Lockyer v. Andrade*,
9 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing
10 *Bell v. Cone*, 535 U.S. 685, 694 (2002)). A state court decision is an unreasonable application
11 of clearly established Supreme Court precedent within the meaning of 28 U.S.C. § 2254(d) “if
12 the state court identifies the correct governing legal principle from [the Supreme] Court’s
13 decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 75
14 (quoting *Williams*, 529 U.S. at 413). “The ‘unreasonable application’ clause requires the state
15 court decision to be more than incorrect or erroneous. The state court’s application of clearly
16 established law must be objectively unreasonable.” *Id.* (quoting *Williams*, 529 U.S. at 409-10)
17 (internal citation omitted).

18 The Supreme Court has instructed that “[a] state court’s determination that a claim lacks
19 merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the
20 correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing
21 *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has stated “that even a
22 strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Id.*
23 at 102 (citing *Lockyer*, 538 U.S. at 75); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)

1 (describing the standard as a “difficult to meet” and “highly deferential standard for evaluating
2 state-court rulings, which demands that state-court decisions be given the benefit of the doubt”
3 (internal quotation marks and citations omitted)).

4 **IV. DISCUSSION**

5 **A. Ground 1¹**

6 O’Keefe argues that his Fifth and Fourteenth Amendment rights to due process and a fair
7 trial were violated because the “trial court failed to stay [his] trial despite notice of [the] writ
8 order.” ECF No. 50 at 17. O’Keefe appears to be claiming that the state district court erred by
9 failing to postpone his state trial when he had a pending issue in federal court regarding a double
10 jeopardy violation. In O’Keefe’s direct appeal following his third trial, the Nevada Supreme
11 Court held that:

12 O’Keefe argues that the district court abused its discretion by denying his request
13 to stay or continue trial for approximately nine months because he had pending
14 proceedings in federal court and was unprepared for trial. The district court rejected
15 O’Keefe’s assertion that his federal proceedings in any way limited his ability to
16 prepare for trial and noted that O’Keefe asked to represent himself and was given
17 ample time to do so effectively. We conclude that the district court did not abuse
18 its discretion by denying O’Keefe’s request for an extended continuance where the
19 delay was his fault. *See Rose v. State*, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007).

20 ECF No. 76-23 at 3-4.

21 On December 16, 2011, approximately six months prior to his third trial, a hearing was
22 held before the state district court pursuant to *Faretta v. California*, 422 U.S. 806 (1975). ECF
23 No. 63 at 2-3. At the beginning of the hearing, O’Keefe stated that he wished to represent
24 himself. *Id.* at 3. The state district court canvassed O’Keefe’s on his request, and then “f[ou]nd

¹ This Court previously found that the equal protection portion of this claim was
unexhausted. ECF No. 106 at 5. Thereafter, O’Keefe filed a declaration of election to abandon
the “equal protection claim in Ground 1.” ECF No. 107 at 2.

1 that [O’Keefe was] competent to waive [his] constitutional right to be represented by an
2 attorney” and that he waived his right freely, voluntarily, and knowingly.² *Id.* at 15. Stand-by
3 counsel was appointed for O’Keefe. *Id.* at 3-16.

4 On January 6, 2012, in *O’Keefe v. Gillespie*, 2:11-cv-02109-GMN-VCF, this Court
5 issued an order explaining that O’Keefe sought “to present constitutional claims regarding his
6 pending Nevada state prosecution, including a double jeopardy claim” and sought “federal
7 intervention to bar the third trial.” ECF No. 7-1 at 121-22. This Court ordered O’Keefe to show
8 cause why “the petition should not be dismissed without prejudice for lack of exhaustion” and
9 “why Ground 3 also is not subject to dismissal without prejudice based upon the *Younger*
10 abstention doctrine.” *Id.* at 123. Thereafter, on February 2, 2012, this Court issued another order
11 in *O’Keefe v. Gillespie*, 2:11-cv-02109-GMN-VCF, explaining that O’Keefe filed an amended
12 petition deleting Grounds 2 and 3. ECF No. 7-1 at 118. This Court then sua sponte dismissed
13 O’Keefe’s amended petition without prejudice for lack of exhaustion and denied O’Keefe a
14 certificate of appealability. *Id.* at 118-120. O’Keefe appealed, and on April 13, 2012, in case
15 number 12-15271, the Ninth Circuit granted O’Keefe a certificate of appealability with regard to
16 two issues: “(1) whether the district court properly determined that [O’Keefe]’s double jeopardy
17 claim was unexhausted, and (2) whether [O’Keefe], as a state pre-trial detainee, was required to
18 exhaust his claim in state court before filing his 28 U.S.C. § 2241 petition.” ECF No. 9-2 at 1.
19 On May 9, 2012, the Ninth Circuit granted O’Keefe’s motion to proceed in forma pauperis,
20 granted his motion for appointment of counsel, and, importantly, denied “[t]he motion to stay
21 state court proceedings.” ECF No. 9-1 at 1-2.

22
23 ² The Nevada Supreme Court later held that “the district court did not abuse its discretion
by granting O’Keefe’s request for self-representation.” *See* ECF No. 76-23 at 3.

1 On June 1, 2012, ten days prior to the beginning of his third trial, O’Keefe’s stand-by
2 counsel filed a motion in state district court to continue O’Keefe’s trial. ECF No. 63-19. In the
3 motion, O’Keefe’s stand-by counsel explained that O’Keefe “currently ha[d] an open case in the
4 United States Court of Appeals for the Ninth Circuit, Case No.: 12-15271” and that “O’Keefe’s
5 federal public defender [was] requesting a stay of this State level trial in the federal courts.” *Id.*
6 at 4-5. On June 5, 2012, the state district court had a calendar call. *See* ECF No. 63-20 at 2. The
7 State indicated that it was ready for trial. *Id.* at 3. In response, O’Keefe stated:

8 I have a comment I want to put out there, Your Honor. Of course, you know,
9 I’ve always been forthright and honest with you, sir. I am claiming a valid violation
10 of my Federal Constitutional Rights Fifth Amendment double jeopardy violation in
11 the Federal Courts, Your Honor.

12 You’re aware that right now we are requesting an emergency stay. Basically
13 I’ll be concise more, Your Honor. If this was the first trial, I would understand that
14 you would probably want to proceed, but being the third trial, Your Honor, I’m not
15 going any where. I have no problem if you agree, if [the State] stipulates to postpone
16 this and let the action be heard in the 9th Circuit.

17 Your Honor, with all due respect I understand that you’ve warned me and
18 told me to be prepared. I’m not going to lie. I’m not really totally prepared, but
19 that’s not your problem, Your Honor. If you deem that we are to proceed with trial
20 Monday, then we have to proceed; that’s the way it is and we’ll let the 9th Circuit
21 deal with it later.

22 However, again, I must stress that the - - you know, again, Your Honor, I’m
23 not going any where. This has had - - I got a motion this morning from my Federal
Public Defender and I’m amazed at all the thousands of hours that have been spent
in this already. And again, Your Honor, like I said the 9th Circuit feels there is
something really there; that there’s a valid substantial claim has been made.

Again, Your Honor, I know I’m sounding like a parrot. I’m not going any
where. For judicial economy and administration just good judgment reasoning, I
would think the right thing to do if the State’s stipulates to this, sir, to just postpone
this ‘till March, status check and - - and let’s see what happens. If the 9th Circuit
deems that no - - there’s no issue, then lets proceed, Your Honor, and let the chips,
you know, lay where they fall.

...

1 But, you know, I do feel that again the economy is in extreme dire
2 emergency state right now and, you know, I'm not trying any tricks. I'm not trying
3 any ploys. Again, the decision ultimately is yours. You did tell me be ready and,
4 you know, that's not your fault, Your Honor. That's a different argument.

5 The argument is if I'm ready to go; no, I'm not really ready to go, Your
6 Honor. I'm asking that you postpone this to possibly March. I think would be an
7 adequate time. Again, I'm not going any where. I've said what I had to say, Your
8 Honor. The decision ultimately is yours.

9 I do want to point out that Mr. Maningo is here as stand-by and my AFPD,
10 Ryan Norwood, is here. If you have any questions that you would like to direct for
11 him, I don't know. That's up to you. I've said what I had to say, Your Honor.

12 *Id.* at 3-5. The state district court then informed O'Keefe that he had "had six months or more
13 than six months since you decided to represent yourself" and asked why O'Keefe was not
14 prepared. *Id.* at 5. O'Keefe responded:

15 Well, I have been preparing somewhat, Your Honor, but again with all due
16 respect, sir, I put it this way, Your Honor, I put my heart thousands of hours into
17 my Federal habeas petition. To be concise on the matter, Judge Gloria Navarro
18 agreed that there was an issue, but she felt that the procedural error had been done.

19 Now, the 9th Circuit had wrote against her and said no it didn't need to be
20 done. Basically what I'm getting at, Your Honor, I put it this way, if the 9th Circuit
21 agrees with me and feels that there really is an issue which I believe there is a valid
22 Federal Constitutional violation going on here, I will be violated against by the laws
23 and trees [sic] of the United States Constitution.

24 Apparently the 9th Circuit is what I'm getting at, sir, I feel if they agree with
25 me, you know, I was going to fight more for the petition. I kind of put all my eggs
26 in the basket, my hopes. And again, Your Honor, I'm not worried any more. If you
27 say we're not going to stop, I'll be there Monday, you know. It'll be what it'll be.
28 You know, I'm just being forthright and honest with you in telling you. Maybe it
29 was a mistake. Maybe it wasn't.

30 Again, I'm not going any where. The decision ultimately is yours. You're
31 in an impasse. I understand exactly. You know, you hear case after case. I would
32 never want your job. It's a big decision for you. Again, the State may not want it.
33 They may want to proceed. I mean, I don't know how the State actually feels about
34 it. . . .

35 *Id.* at 5-6.

1 The State explained that it had placed this matter on the calendar call the previous week
2 because it had two jury trials—O’Keefe’s trial and another murder trial—that were scheduled the
3 same day. *Id.* at 9. After O’Keefe failed to ask for a continuance at that time, the State explained
4 that it continued its other trial because the state district court assured it that O’Keefe’s trial
5 “would be proceeding as scheduled.” *Id.*

6 O’Keefe’s federal counsel explained at the calendar call that the motion for stay had been
7 denied by the Ninth Circuit but that a motion to reconsider had been filed. *Id.* at 11-12.

8 O’Keefe’s federal counsel also clarified that although O’Keefe may not have articulated his
9 request very well, O’Keefe “would like a stay or a continuance to be granted in this Court.” *Id.* at
10 14. The state district court denied “any oral request to continue the trial,” explaining that “if the
11 9th Circuit issues a stay on Friday, then so be it and then the matter [is] stayed. If they don’t issue
12 a stay, then we’ll proceed to trial on Monday morning.” *Id.* The state district court also explained
13 that “just because you filed motions with the 9th Circuit it doesn’t tell you to stop preparing for
14 trial.” *Id.* at 15. On the morning of the first day of trial, the State represented that the Ninth
15 Circuit “elected twice not to stay” O’Keefe’s third trial. ECF No. 63-21 at 23.

16 Federal courts are precluded from issuing injunctions of pending state criminal
17 prosecutions absent special or extraordinary circumstances. *Younger v. Harris*, 401 U.S. 37, 40,
18 53-54 (1971); *see also Drury v. Cox*, 457 F.2d 764, 764-65 (9th Cir. 1972) (“[O]nly in the most
19 unusual circumstances is a defendant entitled to have federal interposition by way of injunction
20 or habeas corpus until after the jury comes in, judgment has been appealed from and the case
21 concluded in the state courts.”); *Carden v. Montana*, 626 F.2d 82, 83-84 (9th Cir. 1980) (finding
22 that the principle of comity requires that a federal court abstain from considering a pre-trial
23 habeas challenge unless special circumstances warrant federal intervention). One extraordinary

1 circumstance that can justify pre-trial habeas relief is “[a] claim that a state prosecution will
2 violate the Double Jeopardy Clause.” *Mannes v. Gillespie*, 967 F.2d 1310, 1312 (9th Cir. 1992).

3 By granting him a certificate of appealability, O’Keefe argues that the Ninth Circuit
4 exercised jurisdiction over his habeas petition and that this exercise of jurisdiction stayed his
5 ongoing state proceedings. ECF No. 50 at 18. “[A] federal court’s exercise of jurisdiction over a
6 habeas petition that raises an affirmative defense to state prosecution before trial and conviction
7 can have the same effect as a direct injunction of ongoing state proceedings.” *Brown v. Ahern*,
8 676 F.3d 899, 900-901 (9th Cir. 2012) (emphasis added). However, an injunction is not required
9 or automatic. In fact, 28 U.S.C. § 2251(a)(1) provides:

10 A justice or judge of the United States before whom a habeas corpus proceeding is
11 pending, *may*, before final judgment or after final judgment of discharge, or
12 pending appeal, stay any proceeding against the person detained in any State court
or by or under the authority of any State for any matter involved in the habeas
corpus proceeding.

13 (Emphasis added.); *see also McFarland v. Scott*, 512 U.S. 849, 858 (1994) (“Section 2251 does
14 not mandate the entry of a stay, but dedicates the exercise of stay jurisdiction to the sound
15 discretion of a federal court.”). Further, regardless of whether an injunction was automatic when
16 the Ninth Circuit granted O’Keefe a certificate of appealability on April 13, 2012, *see* ECF No.
17 9-2, it later denied O’Keefe’s “motion to stay [the] state court proceedings” on May 9, 2012,
18 ECF No. 9-1 at 2, thereby nullifying any previous stay. *See* 28 U.S.C. § 2251(b) (“If no stay is
19 granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were
20 pending.”).

21 Although the Ninth Circuit denied O’Keefe’s motion for a stay, it must also be assessed
22 whether the state district court should have nonetheless continued O’Keefe’s trial in order to
23 allow the Ninth Circuit to rule on O’Keefe’s appeal. “The matter of continuance is traditionally

1 within the discretion of the trial judge, and it is not every denial of a request for more time that
2 violates due process even if the party fails to offer evidence or is compelled to defend without
3 counsel.” *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). Further, “[t]here are no mechanical tests
4 for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer
5 must be found in the circumstances present in every case, particularly in the reasons presented to
6 the trial judge at the time the request is denied.” *Id.* Because “[t]rial judges necessarily require a
7 great deal of latitude in scheduling trials” due to issues of “assembling the witnesses, lawyers,
8 and jurors at the same place at the same time,” continuances should not be granted “except for
9 compelling reasons . . . ; only an unreasoning and arbitrary ‘insistence upon expeditiousness in
10 the face of a justifiable request for delay’ violates the right to the assistance of counsel.” *Morris*
11 *v. Slappy*, 461 U.S. 1, 11-12 (1983) (quoting *Ungar*, 376 U.S. at 589) (acknowledging that
12 appropriate factors to consider include administration of justice, difficulty in assembling
13 witnesses, bad faith delaying tactics, victims’ concerns); *see also Houston v. Schomig*, 533 F.3d
14 1076, 1079 (9th Cir. 2008) (“The record supports the state court’s conclusion that the trial judge
15 acted within his broad discretion in denying Houston’s motion for a continuance to retain
16 counsel. Specifically, he confirmed that counsel was able to proceed to trial, evaluated Houston’s
17 diligence in timely retaining private counsel, and weighed the potential impact a continuance
18 may have on the victims and witnesses.”)

19 O’Keefe’s stand-by counsel requested a continuance of the trial date due to O’Keefe’s
20 federal case. *See* ECF No. 63-19. And O’Keefe requested a continuance due to his federal case
21 and because he was “not really totally prepared.” *See* ECF No. 63-20 at 4. O’Keefe explained
22 that he “put [his] heart [and] thousands of hours into [his] Federal habeas petition” and that he
23 “kind of put all [his] eggs in [one] basket.” *Id.* at 5-6. Because the stay was denied by the Ninth

1 Circuit and because it is clear that O’Keefe focused on his federal appeal at the expense of his
2 state trial, there does not appear to be a “compelling reason” why a continuance should have
3 been granted. *Morris*, 461 U.S. at 11. Therefore, because O’Keefe’s right to a fair trial and right
4 to due process were not violated, the Nevada Supreme Court’s ruling was not contrary to, or an
5 unreasonable application of, clearly established federal law, as determined by the Supreme
6 Court, and was not based on an unreasonable determination of the facts in light of the evidence.
7 *See* 28 U.S.C. § 2254(d). The Court will deny O’Keefe habeas corpus relief with respect to
8 Ground 1.

9 **B. Ground 3³**

10 O’Keefe argues that his Fifth and Fourteenth Amendment rights to be free from double
11 jeopardy were violated. ECF No. 50 at 43. O’Keefe asserts that the “first reversal [was]
12 tantamount to an acquittal for second-degree murder because express or implied malice are
13 constitutionally acceptable alternatives to satisfy the mens rea requirement for second-degree
14 murder.” *Id.* at 45. The Respondents argue that the Nevada Supreme Court held that the evidence
15 presented at O’Keefe’s first trial did not support second-degree felony murder; it did not hold
16 that the evidence presented did not support *any* theory of second-degree murder, such as killing
17 by express or implied malice. ECF No. 115 at 19-20.

18 In O’Keefe’s direct appeal following his first trial, the Nevada Supreme Court held:

19 O’Keefe contends that the district court erred by giving the State’s proposed
20 instruction on second-degree murder because it set forth an alternative theory of
21 second-degree murder, the charging document did not allege this alternate theory,
22 and no evidence supported this theory. We agree. “The district court has broad
discretion to settle jury instructions, and this court reviews the district court’s
decision for an abuse of that discretion or judicial error. An abuse of discretion

23 ³ This Court previously found that the portion of this claim that was based on *Schad v. Arizona* was unexhausted. ECF No. 106 at 5. Thereafter, O’Keefe filed a declaration of election to abandon “only [the] *Shad* [portion] from (exh. 228, pp 7-11) Ground 3.” ECF No. 107 at 2.

1 occurs if the district court's decision is arbitrary or capricious or if it exceeds the
2 bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585
3 (2005) (internal quotation marks and footnote omitted). Here, the district court
4 abused its discretion when it instructed the jury that second-degree murder includes
5 involuntary killings that occur in the commission of an unlawful act because the
6 State's charging document did not allege that O'Keefe killed the victim while he
7 was committing an unlawful act and the evidence presented at trial did not support
8 this theory of second-degree murder. *Cf.*, *Jennings v. State*, 116 Nev. 488, 490, 998
9 P.2d 557, 559 (2000) (adding an additional theory of murder at the close of the case
violates the Sixth Amendment and NRS 173.075(1)). The district court's error in
giving this instruction was not harmless because it is not clear beyond a reasonable
doubt that a rational juror would have found O'Keefe guilty of second-degree
murder absent the error. *See Neder v. United States*, 527 U.S. 1, 18-19 (1999);
Wegner v. State, 116 Nev. 1149, 1155-56, 14 P.3d 25, 30 (2000), overruled on other
grounds by *Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006). Because we
conclude that the judgment of conviction must be reversed and the case remanded
for a new trial, we need not reach O'Keefe's remaining contentions.

10 ECF No. 59-20 at 2-3.

11 In O'Keefe's direct appeal following his third trial, the Nevada Supreme Court held:

12 O'Keefe argues that his conviction violates double jeopardy because this court
13 reversed his prior conviction for the same offense after concluding that insufficient
14 evidence was presented at trial. O'Keefe is mistaken. This court reversed his prior
15 conviction because the jury was erroneously instructed regarding a theory that the
16 killing occurred during the commission of an unlawful act, which was not alleged
17 in the charging document and was not supported by the evidence. *O'Keefe v. State*,
18 Docket No. 53859 (Order of Reversal and Remand, April 7, 2010). Double
19 jeopardy does not preclude O'Keefe's instant conviction under an alternate theory
of second-degree murder which was presented at his first trial and alleged in the
charging document. *See Parker v. Norris*, 64 F.3d 1178, 1180-82 (8th Cir. 1995)
(finding no double jeopardy violation where defendant's conviction for felony
murder was reversed due to error and defendant was convicted at a second trial
under an alternative theory of murder); *see also Stephens v. State*, 127 Nev. ____,
____, 262 P.3d 727, 734 (2011) (the remedy for errors unrelated to sufficiency of
the evidence is reversal and remand for a new trial, not an acquittal).

20 ECF No. 76-23 at 2-3.

21 The Fifth Amendment's Double Jeopardy Clause prohibits multiple punishments for the
22 same offense. U.S. Const. amend. V. The Fifth Amendment guarantee against double jeopardy is
23 enforceable against the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S.

1 784, 794 (1969). The Double Jeopardy Clause provides three related protections: (1) it prohibits
2 a second prosecution for the same offense after acquittal; (2) it prohibits a second prosecution for
3 the same offense after conviction; and (3) it prohibits multiple punishments for the same offense.
4 *United States v. Wilson*, 420 U.S. 332, 343 (1975). “[T]he Double Jeopardy Clause’s general
5 prohibition against successive prosecutions does not prevent the government from retrying a
6 defendant who succeeds in getting his first conviction set aside, through direct appeal or
7 collateral attack, because of some error in the proceedings leading to conviction.” *Lockhart v.*
8 *Nelson*, 488 U.S. 33, 38 (1988); *see also United States v. Scott*, 437 U.S. 82, 90-91 (1978) (“The
9 successful appeal of a judgment of conviction, on any ground other than the insufficiency of the
10 evidence to support the verdict, . . . poses no bar to further prosecution on the same charge.”). A
11 reversal of a conviction due to a trial error, as compared to a reversal due to insufficient
12 evidence, “is a determination that a defendant has been convicted through a judicial process
13 which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence,
14 incorrect instructions, or prosecutorial misconduct.” *Burks v. United States*, 437 U.S. 1, 15
15 (1978).

16 Indeed, the Nevada Supreme Court reversed O’Keefe’s conviction following his first trial
17 due to incorrect instructions: “the district court abused its discretion when it instructed the jury
18 that second-degree murder includes involuntary killings that occur in the commission of an
19 unlawful act.” ECF No. 59-20 at 2; *cf. DuBois v. Lockhart*, 859 F.2d 1314, 1318 (8th Cir. 1988)
20 (“In determining whether a reversal was based on evidentiary sufficiency [for double jeopardy
21 purposes], we must rely on the reasons of the reversing court.”). Because O’Keefe’s conviction
22 was reversed due to incorrect jury instructions, which is a trial error, *see Burks*, 437 U.S. at 15,
23 the State was not prohibited from retrying him. *Lockhart*, 488 U.S. at 38.

1 O'Keefe argues that the Nevada Supreme Court's ruling reversing his conviction was not
2 based merely on a trial error, but rather, it was based on insufficient evidence. ECF No. 50 at 51.
3 In holding that "the district court abused its discretion when it instructed the jury that second-
4 degree murder includes involuntary killings that occur in the commission of an unlawful act," the
5 Nevada Supreme Court reasoned that "the State's charging document did not allege that O'Keefe
6 killed the victim while he was committing an unlawful act and *the evidence presented at trial did*
7 *not support this theory of second-degree murder.*" ECF No. 59-20 at 2-3 (emphasis added).
8 While this final part of the Nevada Supreme Court's reasoning does explain that there was
9 insufficient evidence to convict O'Keefe of felony murder, a theory of second-degree murder
10 which was not charged, this statement does not amount to an acquittal. "[A]n 'acquittal' includes
11 'a ruling by the court that evidence is insufficient to convict, a 'factual finding [that] necessarily
12 establish[es] the criminal defendant's lack of criminal culpability,' and any other 'rulin[g] which
13 relate[s] to the ultimate question of guilt or innocence.'" *Evans v. Michigan*, 568 U.S. 313, 319
14 (2013) (alterations in original); *see also Scott*, 437 U.S. at 91 ("A judgment of acquittal[can be]
15 based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to
16 convict."). The Nevada Supreme Court's ruling does not meet any of these definitions. In fact,
17 the Nevada Supreme Court's reversal of O'Keefe's conviction did not touch upon the "ultimate
18 question" of O'Keefe's "guilt or innocence." *Evans*, 568 U.S. at 319. Rather, the reversal of
19 O'Keefe's conviction was based entirely on the erroneous jury instruction.

20 Therefore, because O'Keefe's third trial was not a violation of the Fifth Amendment right
21 to be free from double jeopardy, the Nevada Supreme Court's ruling was not contrary to, or an
22 unreasonable application of, clearly established federal law, as determined by the Supreme
23 Court, and was not based on an unreasonable determination of the facts in light of the evidence.

1 See 28 U.S.C. § 2254(d). The Court will deny O’Keefe habeas corpus relief with respect to
2 Ground 3.

3 **C. Ground 4**

4 O’Keefe argues that his Fifth, Sixth, and Fourteenth Amendment rights to due process, a
5 jury trial, and a fair trial were violated when the state district court denied his proposed
6 malignant heart jury instruction. ECF No. 50 at 56-57. Specifically, it appears that O’Keefe
7 asserts that Nevada’s implied malice statute, Nev. Rev. Stat. § 200.020(2), should be interpreted
8 for the jury and should include the following factors: “‘extreme recklessness,’ ‘conscious
9 disregard,’ ‘knowledge his conduct endangers life.’” ECF No. 116 at 51.

10 In O’Keefe’s direct appeal following his third trial, the Nevada Supreme Court held:

11 O’Keefe argues that the district court abused its discretion by rejecting his proposed
12 instructions and by giving instructions over his objection. “The district court has
13 broad discretion to settle jury instructions, and this court reviews the district court’s
14 decision for an abuse of that discretion or judicial error.” *Crawford v. State*, 121
15 Nev. 744, 748, 121 P.3d 582, 585 (2005). Because O’Keefe has not provided this
16 court with the instructions given at trial, he fails to demonstrate that the district
17 court abused its direction by rejecting his proposed instruction. *See generally*
18 *Vallery v. State*, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002) (noting that a district
19 court does not err by refusing an accurate instruction related to the defendant’s
20 theory of the case if it is substantially covered by other instructions); *see also*
21 *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) (“The burden to make
22 a proper appellate record rests on appellant.”). O’Keefe also does not identify which
23 instructions he contends were erroneously given. We conclude that he fails to
demonstrate that the district court abused its discretion.

19 ECF No. 76-23 at 4-5.

20 While settling jury instructions, O’Keefe presented the state district court with his
21 proposed jury instruction on “abandoned and malignant heart, implied malice murder theory.”

22 ECF No. 63-27 at 154-56. O’Keefe’s proposed jury instruction stated:

23 The abandoned and malignant heart implied malice requires that the State prove
beyond a reasonable doubt that Brian O’Keefe acted with an extreme recklessness

1 regarding homicidal risk. That is, he must have intended to commit acts which
2 caused the death of Victoria Whitmarsh, he must have known that his acts were
3 likely to cause her death, and he must have consciously disregarded the risk to her
4 life.

4 ECF No. 7-2 at 29. In support of his proposed jury instruction, O’Keefe explained that “[i]t is an
5 unintentional murder, based on an unlawful act. It has to have conscious knowledge and
6 disregard.” ECF No. 63-27 at 156. The State objected to the proposed instructing explaining that
7 “[t]he malice aforethought instruction that we give has been approved routinely and repeatedly
8 by the Nevada Supreme Court.” *Id.* O’Keefe then rebutted:

9 This is the third trial, Your Honor. They’ve had - - there are three types of
10 mens rea - - of malice murder, the mens rea. They’ve had intentional - - intent to
11 kill. They have had now the felony murder, mens rea. And now, this is the last one
12 remaining.

12 In Nevada, we all know - - you know better than me; abandoned and
13 malignant heart is the equivalent to depraved heart murder. That is sufficient for
14 second degree implied malice murder. It states it clearly in *Coleman v. State*. In
15 2000, the Nevada Supreme Court stated this. It’s on page 19. I even remember it in
16 the authority.

15 It quite clearly states, the abandoned and malignant heart instruction must
16 be pretty well given on an implied malice murder charge. If it was the first trial, I
17 mean, [the State] could foresee it on simple malice aforethought. But I’ve already
18 been acquitted of intentional - - the intentional stabbing, is my argument, being
19 acquitted by the first degree intentional stabbing.

18 And, okay, so then they return to second degree murder. Okay, was it on
19 theory 1, or theory 2? I guess we don’t know, since they got it with duplicity. Was
20 it the simple malice murder, second degree; or was it a felony murder, second
21 degree? Still, my argument in the Ninth Circuit is, it didn’t matter whether it was
22 simple murder or felony murder. Second degree murder is still second degree
23 murder for double jeopardy.

21 . . .

22 Okay, so they took out the felony murder. Now, they’re trying to just
23 proceed back on the malice aforethought murder. Expressed malice is gone. It’s in
Byford vs. Nevada. Again, I’ll use that authority; you were the judge. [The State]
happened to be the prosecutor. They quite clearly state, expressed malice goes with

1 first degree murder. And you know it better than me. 994 P.2d, page 700, Your
2 Honor, 2000.

3 *Id.* at 156-57.

4 The state district court disallowed O’Keefe’s proposed instruction explaining that “we
5 have an instruction in here, ‘Malice may be implied when no considerable provocation appears,
6 or when all the circumstances of the killing show an abandoned and malignant heart.’ That’s one
7 of the instructions I’m going to give. That’s a stock instruction.” *Id.* at 157-58. The state district
8 court gave the following relevant instructions to the jury:

9 INSTRUCTION No. 4: Murder of the second degree is the unlawful killing
10 of a human being, with malice aforethought, either express or implied. The
11 unlawful killing may be effected by any of the various means by which death may
12 be occasioned.

13 INSTRUCTION No. 5: Malice aforethought means the intentional doing of
14 a wrongful act without legal cause or excuse or what the law considers adequate
15 provocation. The condition of mind described as malice aforethought may arise,
16 from anger, hatred, revenge or from particular ill will, spite or grudge toward the
17 person killed. It may also arise from any unjustifiable or unlawful motive or
18 purpose to injure another, proceeding from a heart fatally bent on mischief, or with
19 reckless disregard of consequence and social duty. Malice aforethought does not
20 imply deliberation or the lapse of any considerable time between the malicious
21 intention to injure another and the actual execution of the intent but denotes an
22 unlawful purpose and design as opposed to accident and mischance.

23 INSTRUCTION No. 6: Express malice is that deliberate intention
unlawfully to take away the life of a human being, which is manifested by external
circumstances capable of proof. Malice may be implied when no considerable
provocation appears, or when all the circumstances of the killing show an
abandoned and malignant heart.

ECF No 63-30 at 5-7.

Issues relating to jury instructions are not cognizable in federal habeas corpus unless they
violate due process. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *see also Gilmore v. Taylor*, 508
U.S. 333, 342 (1993) (“[W]e have never said that the possibility of a jury misapplying state law

1 gives rise to federal constitutional error.”). The question is ““whether the ailing instruction by
2 itself so infected the entire trial that the resulting conviction violates due process’, . . . not merely
3 whether ‘the instruction is undesirable, erroneous, or even universally condemned.’” *Henderson*
4 *v. Kibbe*, 431 U.S. 145, 154 (1977) (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973)).
5 When reviewing a jury instruction, the court inquires as to “whether the instructions as a whole
6 are misleading or inadequate to guide the jury’s deliberation.” *United States v. Frega*, 179 F.3d
7 793, 806 n.16 (9th Cir. 1999) (internal citations omitted); *see also Estelle*, 502 U.S. at 72
8 (explaining that a challenged instruction ““may not be judged in artificial isolation,’ but must be
9 considered in the context of the instructions as a whole and the trial record” (quoting *Cupp*, 414
10 U.S. at 147)). Furthermore, jurors are presumed to follow the instructions that they are given.
11 *United States v. Olano*, 507 U.S. 725, 740 (1993). Even if an instruction contains a constitutional
12 errors, the court must then “apply the harmless-error analysis mandated by *Brecht*[*v.*
13 *Abrahamson*, 507 U.S. 619 (1993)].” *Calderon v. Coleman*, 525 U.S. 141, 146 (1998). The
14 question is whether the error had a “substantial and injurious effect or influence in determining
15 the jury’s verdict.” *Id.* at 145.

16 The heart of O’Keefe’s argument focuses on the fact that a petitioner’s due process rights
17 are violated if a jury instruction “ha[s] the effect of relieving the State of the burden of proof
18 enunciated in *Winship* on the critical question of petitioner’s state of mind.” *Sandstrom v.*
19 *Montana*, 442 U.S. 510, 521 (1979); *see also In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he
20 Due Process Clause protects the accused against conviction except upon proof beyond a
21 reasonable doubt of every fact necessary to constitute the crime with which he is charged.”);
22 *Evanchyk v. Stewart*, 340 F.3d 933, 939 (9th Cir. 2003) (“It is a violation of due process for a
23 jury instruction to omit an element of the crime.”).

1 In “the crime of second degree murder . . . a specific intent to kill need not be found.”
2 *Hancock v. State*, 80 Nev. 581, 583, 397 P.2d 181, 182 (Nev. 1964). Instead, second-degree
3 murder requires a finding of malice, express or implied. *Labastida v. State*, 115 Nev. 298, 307-
4 08, 986 P.2d 443, 449 (1999); *see also* Nev. Rev. Stat. § 200.010(1) (“Murder is the unlawful
5 killing of a human being . . . [w]ith malice aforethought, either express or implied; . . . The
6 unlawful killing may be effected by any of the various means by which death may be
7 occasioned.”). “Malice shall be implied when no considerable provocation appears, or when all
8 the circumstances of the killing show an abandoned and malignant heart.” Nev. Rev. Stat. §
9 200.020(2). Implied malice is the mental element for depraved-heart—abandoned and malignant
10 heart—murder. *Collman v. State*, 116 Nev. 687, 712, 7 P.3d 426, 442 (Nev. 2000).

11 O’Keefe does not appear to take issue with Jury Instructions No. 4 or No. 6. Indeed, these
12 instructions are direct reiterations of Nev. Rev. Stat. § 200.010(1) and Nev. Rev. Stat. § 200.020,
13 respectively. Rather, O’Keefe’s assertion is that the state district court should have used his
14 proposed jury instruction, *see* ECF No. 7-2 at 29, instead of Jury Instruction No. 5, *see* ECF No.
15 63-30 at 6. However, this assertion lacks merit. The second and third sentences of Jury
16 Instruction No. 5 have been expressly approved by the Nevada Supreme Court. *See Guy v. State*,
17 108 Nev. 770, 776-77, 839 P.2d 578, 582-83 (Nev. 1992) (holding that the following jury
18 instruction was valid: “The condition of the mind described as malice aforethought may arise,
19 not alone from anger, hatred, revenge or from particular ill will, spite or grudge toward the
20 person killed, but may result from any unjustifiable or unlawful motive or purpose to injure
21 another, which proceeds from a heart fatally bent on mischief or with reckless disregard of
22 consequences and social duty”); *see also Thedford v. Sheriff, Clark County*, 86 Nev. 741, 744,
23 476 P.2d 25, 27 (Nev. 1970) (“Malice as applied to murder does not necessarily import ill will

1 toward the victim, but signifies general malignant recklessness of others' lives and safety or
2 disregard of social duty."); *Leonard v. State*, 114 Nev. 1196, 1208, 969 P.2d 288, 296 (Nev.
3 1998) ("Although the[] phrase[a heart fatally bent on mischief is] not common in today's
4 general parlance, we conclude that [its] use did not deprive appellant of a fair trial."). Moreover,
5 the entirety of Jury Instruction No. 5 has been previously upheld on habeas review by this Court.
6 *See Archie v. Foster*, 2017 WL 3923963, at *7 (D. Nev. Sept. 7, 2017).

7 Finally, O'Keefe's proposed language—"acted with an extreme recklessness regarding
8 homicidal risk," "must have known that his acts were likely to cause [the victim's] death," and
9 "he must have consciously disregarded the risk to her life"—are not required by Nevada law.
10 O'Keefe appears to have obtained the "conscious disregard for human life" and "one must have
11 known his acts were dangerous to life" language from *Labastida v. State*, 112 Nev. 1502, 931
12 P.2d 1334 (Nev. 1996). *See* ECF No. 116 at 52. However, not only was this language only used
13 in the dissent portion of *Labastida v. State*, 112 Nev. 1502, 931 P.2d 1334 (Nev. 1996), but also
14 *Labastida v. State*, 112 Nev. 1502, 931 P.2d 1334 (Nev. 1996) was modified and superseded on
15 rehearing by *Labastida v. State*, 115 Nev. 298, 986 P.2d 443 (Nev. 1999). And O'Keefe appears
16 to have obtained the "extreme recklessness" language from Black's Law Dictionary, *Collman v.*
17 *State*, 116 Nev. 687, 7 P.3d 426 (Nev. 2000), and *United States v. Crowe*, 563 F.3d 969 (9th Cir.
18 2009). *See* ECF No. 116 at 52-53. The Nevada Supreme Court's "extreme recklessness"
19 language in *Collman* came from a citation to a comment in the Model Penal Code § 210.2. 116
20 Nev. at 713, 7 P.3d at 442. And *Crowe* did not discuss Nevada law nor second-degree murder;
21 indeed, in *Crowe*, the defendant was convicted of involuntary manslaughter in federal court. 563
22 F.3d 969 (9th Cir. 2009)

23

1 Because Jury Instruction No. 5 properly instructed the jury on implied malice, it did not
2 “reliev[e] the State of [its] burden of proof . . . on the critical question of [O’Keefe]’s state of
3 mind.” *Sandstrom*, 442 U.S. at 521. Accordingly, it cannot be concluded that Jury Instruction
4 No. 5, which was used over O’Keefe’s unsupported proposed jury instruction, “so infected the
5 entire trial that the resulting conviction violates due process.” *Henderson*, 431 U.S. at 154.
6 Therefore, the Nevada Supreme Court’s ruling was not contrary to, or an unreasonable
7 application of, clearly established federal law, as determined by the Supreme Court, and was not
8 based on an unreasonable determination of the facts in light of the evidence. *See* 28 U.S.C. §
9 2254(d). The Court will deny O’Keefe habeas corpus relief with respect to Ground 4.⁴

10 **V. CERTIFICATE OF APPEALABILITY**

11 The standard for the issuance of a certificate of appealability requires a “substantial
12 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c). The Supreme Court has
13 interpreted 28 U.S.C. § 2253(c) as follows:

14 Where a district court has rejected the constitutional claims on the merits, the
15 showing required to satisfy § 2253(c) is straightforward: The petitioner must
16 demonstrate that reasonable jurists would find the district court’s assessment of the
constitutional claims debatable or wrong.

17 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79
18 (9th Cir. 2000).

21 ⁴ O’Keefe requested a remand for an evidentiary hearing on this ground. ECF No. 50 at
22 60. However, O’Keefe also contradictorily indicated that the evidentiary hearing was “not
23 needed.” *Id.* Because this Court has already determined that Jury Instruction No. 5 properly
instructed the jury on implied malice and that O’Keefe’s proposed instruction was improper,
neither further factual development nor any evidence that would be proffered at an evidentiary
hearing would affect this Court’s reasons for denying this ground. Thus, there is no good cause
to grant this request.

1 Applying this standard, the Court finds that a certificate of appealability is unwarranted in
2 this case. The Court will deny O’Keefe a certificate of appealability.

3 **VI. CONCLUSION**

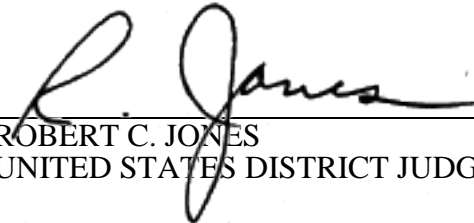
4 IT IS THEREFORE ORDERED that the Petition for a Writ of Habeas Corpus Pursuant
5 to 28 U.S.C. § 2254 by a Person in State Custody (ECF No. 50) is DENIED.

6 IT IS FURTHER ORDERED that O’Keefe is denied a certificate of appealability.

7 IT IS FURTHER ORDERED that, pursuant to Federal Rule of Civil Procedure 25(d), the
8 Clerk of Court is directed to substitute Brian E. Williams for Robert LeGrand as the Respondent
9 warden on the docket for his case.

10 IT IS FURTHER ORDERED that the Clerk of the Court is directed to enter judgment
11 accordingly.

12 DATED: **October 17, 2019.**

13 
14 ROBERT C. JONES
15 UNITED STATES DISTRICT JUDGE
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